In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 824

CLARENCE CISIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 6a) is not reported.

JURISDICTION

The judgment of the Court of Claims dismissing petitioner's claim was entered on November 15, 1963. The petition for a writ of certiorari was filed on February 12, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether the Court of Claims correctly ruled that petitioner's claims for military disability retirement pay were barred by the statute of limitations (28 U.S.C. 2501) because the suit was filed more than six years after a Physical Evaluation Board determination that petitioner was unfit for service by reason of physical disability.

STATUTE INVOLVED

Title 28 of the United States Code, Section 2501, provides in pertinent part:

> Time for Filing Suit:
>
> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, within six years after such claim first accrues.

STATEMENT

Petitioner served on active duty as an officer in the United States Navy from March 20, 1918, to September 30, 1921, when his commission was terminated. He was recalled for active duty on September 22, 1942, and served continuously until 1954. On April 26, 1954, he appeared before a Physical Evaluation Board which found two service-connected disabilities, degenerative disc disease and meralgia. The combined rating of these disabilities was found to be twenty per cent. A third disability, arthritis of the right wrist, was not rated because it was found that this disability was not incurred while petitioner was

entitled to receive basic pay. These findings were concurred in by the Physical Review Council and approved by the Secretary of the Navy on May 10, 1954. On June 4, 1954, petitioner was honorably discharged by reason of physical disability, with severance pay of $12,449.80. In 1955 petitioner filed an application for review with the Navy Board of Correction, together with evidence that indicated that his right wrist was injured while he was on active duty. That application was denied, as were subsequent applications for reconsideration.

On July 12, 1962, petitioner brought this action for military disability retirement pay. On the government's motion to dismiss, the court held that petitioner's claim was barred by the statute of limitations and dismissed the petition (Pet. App. 6a).

ARGUMENT

This Court has recently denied certiorari to review Court of Claims decisions presenting the same issue raised by the present petition. *Lipp* v. *United States*, 301 F. 2d 674 (Ct. Cls.), certiorari denied, 373 U.S. 932; *Friedman* v. *United States*, 310 F. 2d 381 (Ct. Cls.), certiorari denied, 373 U.S. 932. Adhering to its decision in those cases, the Court of Claims has once again held that a claim for military disability retirement pay accrues upon the final action of a Retiring Board. That ruling does not conflict with the decisions of this or any other court. Accordingly, no question meriting review by this Court is presented.

1. The prior decisions of the Court of Claims make it clear that petitioner's claim is barred by the statute of limitations, 28 U.S.C. 2501. In *Friedman* v. *United States*, *supra*, the Court of Claims canvassed its previous decisions in military disability pay cases and clearly delineated the application of 28 U.S.C. 2501 to each category of such claims. The court there summarized the limitations rule as follows (310 F. 2d at 395-96):

> Summary: As our discussion has shown, the main course of the court's decisions on the time-bar in the disability retirement field reveals a well-structured design:
>
> (a). The judicial claim for disability retirement pay does not accrue on release from active duty but rather on *final* action of a board competent to pass upon eligibility for disability retirement (or upon refusal of a request for such a board).
>
> (b). Normally, the Retiring Board is the proper board, but where the claimant has not had or sought a Retiring Board, his claim does not accrue until final action by the Correction Board (which in that instance stands in the place of the Retiring Board as the proper tribunal to determine eligibility for disability retirement).
>
> (c). A board's action (or failure to act) is not final if (i) the claimant has been misled, (ii) the board's decision is tentative and invites reopening, (iii) the armed service itself reopens the case, or (iv) there are other circumstances depriving the action or non-action of finality.
>
> (d). Once a final decision is had, the claim accrues, the limitations period begins to run, and

there is no tolling of the statute by reason of further applications to other boards or agencies (including the Correction Board).

(e). Once a final decision is had, adverse determinations by other boards, including the Correction Board, do not give rise to a new cause of action.

(f). A claim for entitlement to disability retirement status and pay—of the type requiring discretionary action by a board and the Secretary—is not a "continuing claim" but accrues as a whole (once it accrues). However, other types of pay claims not dependent on a board finding—including claims for increased retirement pay because of new legislation, etc.—are "continuing" claims.

Contrary to petitioner's assertions (Pet. 8-10), teh Court of Claims decision in *Friedman* is both correct and dispositive of petitioner's claims. It is based upon "the normal rule" that "where a proper administrative tribunal has denied or refused to consider a claim and further administrative remedies are permissive not mandatory . . . the judicial cause of action arises immediately upon the initial tribunal's action and does not start again upon a subsequent administrative decision affirming that holding." 310 F. 2d at 396. Speaking for the court, Judge Davis rejected the argument that, after a Disability Review Board has denied a claim, a judicial cause of action is created by a subsequent denial of the same claim by a Correction Board (310 F. 2d at 600-01):

> * * * it is unusual to have two or more causes of action stemming from the same events or transactions, but arising at wholly different times. Theoretically, it would not be impossible for Congress to make such provision, but in the absence of some definite legislative indication to that effect it is preferable to follow the normal principle that out of one set of facts and circumstances involving the claimant's separation from service there arises but one claim for the same kind of relief (money, in the case of disability retirement pay claims). This is all the more true since our limitations statute is phrased in terms of the "*first*" accrual of the claim. 28 U.S.C. § 2501. The legislative emphasis on *first* accrual cautions against multiplication of monetary claims successively arising out of essentially the same facts.

Here petitioner's claim was determined by the Physical Evaluation Board and the Disability Review Council in 1954. It was then that his claim "first accrue[d]" within the meaning of 28 U.S.C. 2501. This suit was filed more than eight years later.

2. Petitioner's attempt to avoid the force of *Friedman* is ineffectual. Plainly, there is no merit in the argument (Pet. 5-8) that he could institute no suit against the United States in the Court of Claims until his disability retirement pay claim accrued to an amount exceeding the severance pay which he had received ($12,449.80)—and which he would be required to refund if he prevailed. For, even though a favorable judgment rendered at that time might immediately produce no net monetary recovery, it would

obviously qualify as a "money judgment," fixing the government's liability for accrued disability retirement pay (and, as a practical matter, for future payments), while at the same time requiring petitioner to refund the severance pay already received.

Equally without merit is petitioner's argument (Pet. 10-11) that the Government's failure to provide legal counsel to assist all claimants at every step of the proceedings before the Board of Correction of Naval Records is a denial of due process. Cf. 5 U.S.C. 1005 (a). Petitioner was afforded the right to be represented by counsel of his own choosing. There is no statute authorizing, nor has due process ever been deemed to require, appointment of counsel in non-criminal administrative proceedings. In any event, petitioner does not allege that a request for the appointment of counsel was ever made.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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PETITIONERS' REPLY BRIEF

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THE UNITED STATES, *Respondent*.

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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THE UNITED STATES, *Respondent*.

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

The Brief for the United States in Opposition completely overlooks *United States* v. *Alire*, 1868, 73 U.S. [6 Wall.] 573[1] wherein this Court concurred in the proposition *then* contended by the Government that the Court of Claims could give no judgments against the United States for anything but money.

Instead, Respondent sets up the case of *Friedman* v. *United States*, C. Cls. 1962, 310 F. 2d 381, *cert. den.*, 373 U.S. 932, as dispositive of the instant case, and argues that *Friedman* cannot be avoided because "even

[1] Although this contrary decision was the first reason advanced by Petitioner for granting his Petition, the Respondent completely ignores the decision and makes no effort to distinguish it in any manner.

though a favorable judgment at that time [the time the United States contends Petitioner's claim first accrued] might immediately produce no net recovery, it would obviously qualify as a 'money judgment', fixing the Government's liability for accrued disability retirement pay (and, as a practical matter, for future payments), while at the same time requiring petitioner to refund the severance pay already received."

Suffice it to say that *Friedman* does not involve the issue of when a money claim arises within the jurisdiction of the United States Court of Claims where an individual is erroneously paid a lump sum severance pay in lieu of retired pay. In fact, *Friedman* does not discuss the question of what constitutes a "money claim" at all.

In contrast, *U. S.* v. *Alire*, *supra*, holds that a money claim *is* necessary to the jurisdiction of the Court of Claims. Accordingly, the remarkable theory which the Respondent is now attempting to foist upon this Court is that a money claim accrues to an individual at a time when there is no money due for him to claim. And, moreover, at a time when, if anything, he has been overpaid and there is at best only a possibility that a money claim will ever ripen in his favor—depending upon uncertainties such as the continued life of both the individual and the statute under which he might someday have a claim for retired pay.

In reference to Petitioner's *second* point involving the question of whether a claim accrues with an arbitrary and capricious action by the Board for Correction of Naval Records, the Respondent has first quoted on pages 4 and 5 of its brief a summary of the limita-

tion rules set forth in *Friedman* v. *United States*, *supra*. Next, on page 5, the Respondent noted that the Court of Claims had in such case rejected the argument that after a *Disability Review Board* has denied a claim, a judicial cause of action is created by a subsequent denial of the same claim by a Correction Board. Then on page 6, the Government asserts that "petitioner's claim was determined by the Physical Evaluation Board and the *Disability Review Council* in 1954." [Emphasis added]

The *Disability Review Board* is a statutory board established under the Servicemen's Readjustment Act of 1944, as amended, 58 Stat. 287; 59 Stat. 623. Such board has never acted on Petitioner's case, nor did it ever have jurisdiction to do so. Also no *Disability Review Council* acted on Petitioner's case in 1954 or at any other time.[2] The *Physical Evaluation Board*, a non-statutory board, *recommended* findings in petitioner's case—the final *determinations* being exercised by the Secretary of the Navy under Section 402(b) of the Career Compensation Act of 1949 [P. App. p. 1a].

The Respondent, accordingly, seems confused as to the facts in this case. So confused, it appears to be contending that under *Friedman* v. *U. S.*, *supra*, Petitioner's claim accrued with the erroneous findings recommended by a non-statutory board and the action

[2] Perhaps the Respondent meant the "Physical Review Council" which is an administrative Council wherein heads of various Navy bureaus and offices or their representatives individually review actions of Physical Evaluation Boards prior to Secretarial action thereon. However, this action is not a final determination. Most certainly, the "Disability Review Board" referred to in the *Friedman* decision never acted on the case as one might inadvertently infer from a quick reading of Respondent's brief.

of a non-existent council, and with such the limitations period began to run.

The simple fact of the matter is that the Petitioner sought to correct an error and injustice for the first time through the statutory Board for Correction of Naval Records and his application was arbitrarily refused. Before the cases of *Friedman* v. *U. S.*, *supra*, and *Lipp* v. *U. S.*, C. Cls. 1962, 301 F. 2d 674, *cert. den.*, 373 U.S. 932, it was generally assumed that an application arbitrarily dismissed by a Correction Board created a new claim, insofar as a moneyed demand was concerned, at the Court of Claims. The *Lipp* and *Friedman* decisions changed this—erroneously the Petitioner believes—and attempted to set out in a comprehensive manner the rule pertaining to the Statute of Limitations in the Court of Claims.[3]

Confusion on the part of the Respondent is somewhat understandable if it is also recognized that the Petitioner's case does *not* fit into any of the summarizations set forth in *Friedman* v. *U. S.*, *supra*, [U.S. Brief, pp. 4-5], unless it be the second sentence of the summary designated (f), whereby Petitioner's claim would be considered a "continuing claim," and as such should not have been dismissed.

The confusion in the Brief of the United States continues wherein on page 7, Petitioner is indicated to

[3] The Court's attention is invited to the circumstance that *Friedman* v. *U.S.*, *supra*, seems also to constitute a judicial repeal of Section 205 of the Soldiers' and Sailors' Civil Relief Act, as amended, 54 Stat. 1181, 56 Stat. 770, USC Title 50, App. Sec. 525, which provides for the exclusion of periods of military service from all limitations actions.

have argued "that the Government's failure to provide legal counsel to assist all claimants at every step of proceedings before the Board of Correction of Naval Records is a denial of due process."

In no way has the Petitioner complained of the Government's failure to provide legal counsel. To the contrary, the complaint is that the Correction Board encouraged the Petitioner in writing to obtain non-lawyer counsel and then delayed acting on a request for reconsideration made by a counsel so obtained for a period of approximately five months, during which the Petitioner became barred from remedial action under the construction of the Statute of Limitations as applied by the Government.

It is respectfully submitted that failure of the United States to meet Petitioner's reasons for the granting of a petition in this case constitutes a tacit admission as to the validity of same.

Respectfully submitted,

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